IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

BENNY RAY GULLY, Petitioner, vs. JOHN AULT, Respondent.	No. C97-3103-MWB **ORDER CONCERNING MAGISTRATE'S REPORT AND RECOMMENDATION REGARDING PETITION FOR WRIT OF HABEAS CORPUS**

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I. INTRODUCTION AND BACKGROUND

Before the court is a petition for a writ of habeas corpus, filed pursuant to 28 U.S.C. § 2254. Petitioner, Benny Ray Gully, is an inmate at the Anamosa State Penitentiary, Anamosa, Iowa. On December 22, 1993, following a jury trial, petitioner Gully was convicted on two counts of attempted murder. On February 11, 1994, Gully, was sentenced to twenty-five years imprisonment for each attempted murder conviction, with the sentences to be served consecutively.

Gully appealed his sentence. The Iowa Court of Appeals affirmed his sentence on January 23, 1995. Gully then filed an application for postconviction relief. Gully's application for postconviction relief was denied by an Iowa district court. His appeal to the Iowa Supreme Court was dismissed as frivolous on April 22, 1997. On December 22, 1997, Gully filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Gully's petition asserts twenty-four grounds for relief.[1] *See* Report and Recommendation at pp. 9-12.

This case was referred to United States Magistrate Judge Paul A. Zoss pursuant to 28 U.S.C. § 636(b)(1)(B). On January 14, 2001, Judge Zoss filed an extremely thorough

[1]The court will refer to petitioner Gully's claims in the same manner employed by Judge Zoss: A(1)-(11); B(1)-(4); C(1)-(2); D; E; and, F(1)-(5).

and comprehensive Report and Recommendation in which he recommends that Gully's petition be denied. Gully filed objections to Judge Zoss's Report and Recommendation on March 2, 2001. The court, therefore, undertakes the necessary review of Judge Zoss's recommended disposition of Gully's petition for a writ of habeas corpus.

II. ANALYSIS

A. Standard Of Review

Pursuant to statute, this court's standard of review for a magistrate judge's Report and Recommendation is as follows:

> A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate [judge].

28 U.S.C. § 636(b)(1). Similarly, Federal Rule of Civil Procedure 72(b) provides for review of a magistrate judge's Report and Recommendation on dispositive motions and prisoner petitions, where objections are made, as follows:

> The district judge to whom the case is assigned shall make a de novo determination upon the record, or after additional evidence, of any portion of the magistrate judge's disposition to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate judge with instructions.

FED. R. CIV. P. 72(b).

The Eighth Circuit Court of Appeals has repeatedly held that it is reversible error for the district court to fail to conduct a *de novo* review of a magistrate judge's report where such review is required. *See, e.g., Hosna v. Groose*, 80 F.3d 298, 306 (8th Cir.) (citing 28 U.S.C. § 636(b)(1)), *cert. denied*, 519 U.S. 860 (1996); *Grinder v. Gammon*, 73 F.3d

793, 795 (8th Cir. 1996) (citing *Belk v. Purkett*, 15 F.3d 803, 815 (8th Cir. 1994)); *Hudson v. Gammon*, 46 F.3d 785, 786 (8th Cir. 1995) (also citing *Belk*). Because objections have been filed in this case, the court must conduct a *de novo* review. With these standards in mind, the court turns to consideration of petitioner Gully's objections to Judge Zoss's Report and Recommendation.

B. Discussion

1. Procedural default and exhaustion of claims

The exhaustion doctrine, currently codified at 28 U.S.C. § 2254(b), is grounded in principles of comity and reflects a desire to "protect the state courts' role in the enforcement of federal law." *Castille v. Peoples*, 489 U.S. 346, 349 (1989) (quoting *Rose v. Lundy*, 455 U.S. 509, 518 (1982)). It is further justified by the pragmatic recognition that "federal claims that have been fully exhausted in state courts will more often be accompanied by a complete factual record to aid the federal courts in their review." *Castille*, 489 U.S. at 349 (quoting *Rose*, 455 U.S. at 519). Although not jurisdictional, it "creates a 'strong presumption in favor of requiring the prisoner to pursue his available state remedies.'" *Castille*, 489 U.S. at 349 (quoting *Rose*, 455 U.S. at 515).

A claim is properly exhausted by presentment when the state courts are given a "'fair opportunity' to apply controlling legal principles to the facts bearing upon [the claim]." *Anderson v. Harless*, 459 U.S. 4, 6 (1982) (quoting *Picard v. Connor*, 404 U.S. 270, 275, 277-78 (1971)). "It is not enough that all the facts necessary to support the federal claim were before the state courts, or that a somewhat similar state-law claim was made." *Anderson*, 459 U.S. at 6 (citing *Picard*, 404 U.S. at 277). The "fair opportunity" standard is satisfied where the petitioner presents "the same facts and legal theories to the state court that he later presents to the federal courts." *Jones v. Jerrison*, 20 F.3d 849, 854 (8th Cir. 1994). Specifically, "[t]he federal legal theory or theories must plainly appear on the face

of the petitioner's state- court briefs." *Id.* A "federal legal theory" is one containing a reference to "a specific federal constitutional right, a particular constitutional provision, a federal constitutional case, or a state case raising a pertinent federal constitutional issue." *Martin v. Solem*, 801 F.2d 324, 330-31 (8th Cir. 1986) (citing *Thomas v. Wyrick*, 622 F.2d 411, 413 (8th Cir. 1980)); *see Jones*, 20 F.3d at 854 (requiring "[e]xplicit citation to the Constitution or to a federal case"); *Luton v. Grandison*, 44 F.3d 626 (8th Cir. 1994) (same); *McDougald v. Lockhart*, 942 F.2d 508, 510 (8th Cir. 1991) (same). It is not necessary that the petitioner obtain a precise ruling on the federal claim from the state court, so long as it has been properly presented. *See Tyler v. Gunter*, 819 F.2d 869, 870-71 (8th Cir. 1987).

Judge Zoss concluded that petitioner Gully had not procedurally defaulted on claims A(10), B(1), B(4), D, E, F(1), F(2), F(3), F(4), and F(5). Petitioner Gully included neither the facts nor the legal theories relevant to these claims in any of his briefs to the Iowa appellate courts. These claims were available to petitioner Gully and could have been raised during either the state direct appeal or postconviction proceedings. Consequently, these claims are subject to procedural default. *Jones v. Jerrison*, 20 F.3d 849, 854 (8th Cir. 1994). Also, because petitioner has not demonstrated either cause or prejudice sufficient to excuse this default, *Wainwright v. Sykes*, 433 U.S. 72 (1977), or evidence of actual innocence, *Coleman v. Thompson*, 501 U.S. 722 (1991), these claims are barred and may not be considered by this court.

2. The requirements of § 2254(d)(1)

Section 2254(d)(1) of Title 28, as amended by the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, provides as follows:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
>
> (1) resulted in a decision that was contrary to, or

> involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States[.]

28 U.S.C. § 2254(d)(1). As the United States Supreme Court explained in *Williams v. Taylor*, 120 S. Ct. 1495 (2000), "[F]or [a petitioner] to obtain federal habeas relief, he must first demonstrate that his case satisfies the condition set by § 2254(d)(1)." *Id.* at 1518.[2] In *Williams*, the Supreme Court addressed the question of precisely what the "condition set by § 2254(d)(1)" requires. *See id.* at 1503-1511 (Part II of the minority decision); *id.* at 1518-23 (Part II of the majority decision).[3] In the portion of the majority decision on this point, the majority summarized its conclusions as follows:

> [Section] 2254(d)(1) places a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court. Under § 2254(d)(1), the writ may issue only if one of the following two conditions is satisfied --the state-court adjudication resulted in a decision that (1) "was contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "involved an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States." Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a

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[2] In a separate provision, the statute also provides for habeas relief when a state-court decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). That provision was not at issue in *Williams*, nor have the parties asserted that it is pertinent here.

[3] In *Williams*, the opinion of Justice Stevens obtained a 6-3 majority, except as to Part II, which is the pertinent part of the decision here. See *Williams*, 120 S. Ct. at 1499. Justice O'Connor delivered the opinion of the Court as to Part II, in which she was joined by Chief Justice Rehnquist and Justices Kennedy, Thomas, and Scalia, thereby obtaining a 5-4 majority on this portion of the decision. *See id.*

> question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

Id. at 1523; *see also Whitmore v. Kemna*, 213 F.3d 431, 433-34 (8th Cir. 2000) ("It seems to us that § 2254(d) as amended by the AEDPA is unambiguous as to the scope of federal court review, limiting such review (at least as compared with past practice) in order to effect the intent of Congress to expedite habeas proceedings with appropriate deference to state court determinations. *See Williams*, 120 S. Ct. at 1518 (noting purposes of AEDPA amendments). The Court also clarified two other important definitions. First, the Court concluded that "unreasonable application" of federal law under § 2254(d)(1) cannot be defined in terms of unanimity of "reasonable jurists"; instead, "the most important point is that an unreasonable application of federal law is different from an incorrect application of federal law." *Id.* at 1522. Consequently, "[u]nder § 2254(d)(1)'s 'unreasonable application' clause, . . . a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be [objectively] unreasonable." *Id.* Second, the Court clarified that "clearly established Federal law, as determined by the Supreme Court of the United States" "refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision," and "the source of clearly established law [is restricted] to this Court's jurisprudence." *Id.* at 1523.

3. Analysis of Gully's claims

a. Claims of ineffective assistance of trial counsel

i. Standards for ineffective assistance of counsel

Turning to the elements of Gully's ineffective assistance of counsel claims, as properly formulated, Gully must make a two-part showing: (1) that his counsel's performance was deficient, that is, that counsel's performance "'fell below an objective standard of reasonableness,'" *see United States v. Craycraft*, 167 F.3d 451, 455 (8th Cir. 1999) (quoting *Strickland v. Washington*, 466 U.S. 668, 688 (1984)); and (2) actual prejudice resulting from the deficient performance, that is, that there is "'a reasonable probability that, but for counsel's errors,' the result would have been different." *Craycraft*, 167 F.3d at 455 (quoting *Strickland*, 466 U.S. at 688); *accord McGurk v. Stenberg*, 163 F.3d 470, 473 (8th Cir. 1998) (applying the same two-prong test); *Young v. Bowersox*, 161 F.3d 1159, 1160 (8th Cir. 1998) (applying the same two-prong test). Both the Supreme Court and the Eighth Circuit Court of Appeals have noted that " '[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.'" *Young*, 161 F.3d at 1160 (quoting *Strickland*, 466 U.S. at 697).

ii. Claims A(1) and A(5)

With respect to Gully's claims that his trial counsel was ineffective in failing to exclude evidence of Gully's prior bad acts or was ineffective because he opened the door to the introduction of such evidence, Judge Zoss concluded that Gully had failed to meet either prong of the *Strickland* test. The court concurs with that conclusion.

As to the first prong of Gully's ineffective assistance claim, deficient performance by counsel, there is a "'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" *McGurk*, 163 F.3d at 473 (quoting *Strickland*, 466 U.S. at 690). Furthermore, strategic decisions made by counsel after a

thorough investigation of law and facts are "virtually unchallengeable." *Strickland*, 466 U.S. at 690. Thus, "'[g]iven the considerable discretion to be afforded counsel, a defendant is more likely to prevail on an ineffective assistance of counsel claim where the error he points to arises from counsel's lack of diligence rather than the exercise of judgment.'" *McGurk*, 163 F.3d at 473 (quoting *United States v. Loughery*, 908 F.2d 1014, 1018 (D.C. Cir. 1990)). Here, Gully's ineffective assistance claims assert a lack of judgment. The court agrees with the magistrate judge that Gully's trial counsel's performance was not deficient. Rather, Gully's trial counsel employed this evidence sparingly to support his theory of defense that Gully had acted in self-defense.

The court further agrees with Judge Zoss's conclusion that Gully was not prejudiced by this claimed deficiency in his counsel's performance. Sufficient evidence was introduced at trial for the jury to conclude that petitioner Gully shot one of the victims as that victim was running away from the scene. Andre Gully, petitioner Gully's nephew, testified that one of the victims was running away from petitioner Gully when he was shot. Tr. at pp.131, 132-33. Andre Gully's testimony was corroborated by witness Johanna Mosely, *See* Tr. at pp. 150-51. Medical evidence was also offered that showed that one of the victims had been shot in the back. *See* Tr. at pp. 208-209. Therefore, defendant Gully's objections to this portion of Judge Zoss's Report and Recommendation are overruled.

iii. Claims A(2) and A(3)

Petitioner Gully further claims that his trial counsel was ineffective for failing to use prior inconsistent statements to impeach three witnesses; Donald Brand, Michael Hayes, and Larncey Foy. Judge Zoss concluded that petitioner Gully had not demonstrated prejudice with respect to this claimed failure in his counsel's performance. Judge Zoss also concluded that, with respect to Officer Hayes' testimony, petitioner Gully had not demonstrated that Gully's trial counsel's performance was deficient. The court agrees with

Judge Zoss's conclusions here. The court concludes that no meaningful inconsistencies existed in the testimony of Officer Hayes. The court further concurs with Judge Zoss's conclusion that petitioner Gully has failed to demonstrate that he was prejudiced by his trial counsel's failure to cross-examine Officer Brand or Larncey Lee Foy regarding certain aspects of their prior statements. The uncontradicted evidence introduced at trial showed that petitioner Gully pointed a gun at one of the victims, Larncey Lee Foy, and pulled the trigger several times. The jury could reasonably infer from petitioner Gully's actions that he intended to shoot Foy. Therefore, petitioner Gully's objections to this portion of the report and recommendation are overruled.

Petitioner Gully further asserts that his trial attorney was ineffective in failing to conduct a thorough examination of Larncey Lee Foy's criminal background and failing to impeach his credibility with his criminal history. Judge Zoss found that petitioner Gully's trial counsel decided not to question Foy about his juvenile criminal record because he believed that such evidence was inadmissible. Judge Zoss further found that Foy's criminal record could have been used for impeachment purposes and that Gully's trial counsel's failure to employ Foy's criminal record fell below an objective standard of reasonableness. Thus, Judge Zoss concluded that Gully had met the first *Strickland* prong. The court concurs with this conclusion. Petitioner Gully's trial counsel incorrectly concluded that Foy's juvenile criminal convictions were inadmissible for impeachment purposes. *See* IOWA R. EVID. 609(d); *State v. Veal*, 564 N.W.2d 797, 807 (Iowa 1997) ("The trial court may, in a criminal case, admit evidence of juvenile adjudications if it is satisfied such evidence is necessary for a fair determination of the defendant's guilt or innocence."). This leaves the second prong of the *Strickland* analysis, under which Judge Zoss found that Gully could not prevail.

As noted above, in order to prevail on the prejudice prong of the *Strickland* analysis, petitioner Gully must "show that counsel's deficient conduct more likely than not altered

the outcome of the case." *Strickland*, 466 U.S. at 696. "When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt." *Id*. In *Strickland*, the Supreme Court emphasized that "a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury." *Id*. at 695. A court simply cannot make this determination without considering the strength of the evidence against the accused. As the Supreme Court stated in *Strickland*, "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Strickland*, 466 U.S. at 696. The court notes that the vast majority of federal circuit courts of appeal have recognized that, in analyzing *Strickland's* prejudice prong, a court must consider the magnitude of the evidence against the defendant. *See, e.g.*, *Hull v. Kyler*, 190 F.3d 88, 106 (3d Cir. 1999); *Huffington v. Nuth*, 140 F.3d 572, 578 (4th Cir.), *cert. denied*, 525 U.S. 981(1998); *Totten v. Merkle*, 137 F.3d 1172, 1175 (9th Cir. 1998); *United States v. Ortiz*, 136 F.3d 161, 166-67 (D.C. Cir. 1998); *United States v. Prows*, 118 F.3d 686, 692-93 (10th Cir. 1997); *Hays v. Alabama*, 85 F.3d 1492, 1496 (11th Cir. 1996), *cert. denied*, 520 U.S. 1123 (1997); *United States v. Gregory*, 74 F.3d 819, 823 (7th Cir. 1996); *Scarpa v. DuBois*, 38 F.3d 1, 16 (1st Cir. 1994), *cert. denied*, 513 U.S. 1129 (1995); *United States v. Royal*, 972 F.2d 643, 650 (5th Cir. 1992), *cert. denied*, 507 U.S. 911 (1993); *Strouse v. Leonardo*, 928 F.2d 548, 556 (2d Cir. 1991); *Otey v. Grammar*, 859 F.2d 575, 580 (8th Cir. 1988), *cert. denied*, 497 U.S. 1031(1990); *Krist v. Foltz*, 804 F.2d 944, 947 (6th Cir. 1986).

It must be remembered that this court is reviewing petitioner Gully's ineffective assistance claim under the AEDPA. This requires the reviewing court to review the state court decision and determine whether it was contrary to clearly established Federal law as determined by the Supreme Court or involved an unreasonable application of Federal law. Where the state court applies the correct legal rule established by the Supreme Court, the

reviewing court must determine whether the state court has applied the rule reasonably. When conducting review under the unreasonable application clause, "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Williams*, 120 S.Ct. at 1522.

Here, the state court did identify *Strickland* as the source of the rule of decision to determine whether petitioner Gully's trial counsel's performance deprived Gully of his right to effective assistance of counsel. The state court ruled that petitioner Gully was not denied effective assistance under the test outlined in *Strickland*. Therefore, the court concludes that the state court's ruling was not "contrary to" clearly established federal law, here *Strickland*, in this respect.

The court further concludes that the state court's application of Federal law was not unreasonable given the overwhelming strength of the state's case against petitioner Gully. Petitioner Gully told police officers Brands and Timothy Hayes that he shot at one of the victims, Ricky Foy, as he was running away and he thought he hit the victim with one of his shots. Tr. at pp. 32, 89. Gully also told the officers that he approached the other victim, Larncey Foy, pointed his gun at him and pulled the trigger several times but the gun did not go off. Tr. at pp. 34, 89. Larncey Foy testified that Gully shot at the other victim, Ricky Foy, as Ricky was running away from the scene. Tr. at p. 63. Larncey Foy also testified that Gully then approached him, aimed his gun at him, and pulled the trigger three of four times but no bullets came out. Tr. at pp. 65-66, 79. Andre Gully, petitioner Gully's nephew, testified that Ricky Foy was running away from petitioner Gully when he was shot. Tr. at pp.131, 132-33. Johanna Mosely also testified that Ricky Foy was running away from petitioner Gully when he was shot by Gully. *See* Tr. at pp. 150-51.

She also testified that she saw Gully walk up to Larncey Foy and shoot at him, but no

bullets came out of Gully's gun. Tr. at pp. 151-52; 159-60. The court concludes that this evidence would permit a jury to convict Gully even if Larncey Foy's testimony was discredited through impeachment with his juvenile criminal record because Gully's conduct could reasonably be found not to constitute self-defense under Iowa law. Therefore, petitioner Gully's objections to this portion of Judge Zoss's report and recommendation are denied.

iv. Claim A(4)

Petitioner Gully further contends that his trial counsel was ineffective for failing to call three witnesses at trial: Tajuwanna Gully, Tiffany Clayton, and Sonja Gully. Judge Zoss concluded that Gully had not demonstrated that he was prejudiced by his trial counsel's failure to call these three witnesses. The court concurs with that conclusion and finds that the state court's application of Federal law, *Strickland*, was not unreasonable given the strength of the state's case against petitioner Gully. Although Gully claims that Tajuwanna Gully would have buttressed his self-defense argument by testifying that Ricky Foy fired first, the evidence presented by three witnesses that Gully shot Ricky while Ricky was fleeing the scene totally undercuts Gully's claim of self-defense under Iowa law. Similarly, while Sonja Gully's testimony regarding a prior altercation between the Foys and Gully may have been useful to contradict Larceny Foy's testimony of the prior nights events, the state court was not unreasonable in its conclusion that it would not have altered the outcome of the trial. Similarly, while Clayton allegedly would have testified that Ricky Foy was standing near the Foys' automobile when he was shot by Gully, three eyewitnesses testified that Ricky Foy was in retreat when he was shot. Thus, the court further concludes that the state court's application of Federal law was not unreasonable on this point. Therefore, petitioner Gully's objections to this portion of Judge Zoss's report and recommendation are also denied.

v. Claim A(5)

Petitioner Gully further contends that his trial counsel was ineffective because he gave him allegedly erroneous advice which caused him to elect not to testify. Specifically, petitioner Gully asserts that his trial counsel incorrectly informed him that if he was to testify that the state would be able to use his prior criminal convictions to impeach his testimony. Judge Zoss found in his report and recommendation that Gully was not denied his constitutional right not to testify and that he was not coerced into not testifying. Thus, Judge Zoss concluded that Gully had failed to show that the state courts decided this issue in a manner contrary to clearly established federal law, or unreasonably applied that law to the facts of this case. Upon review of the record, the court concurs in that conclusion. The state post-conviction court found that Gully's trial counsel acted on the reasonable belief that Gully's affinity for violence might come in if he testified, thus undermining and critically damaging Gully's claim of self-defense. The court concludes that Gully's trial counsel's advice was well within the bounds of reasonable professional judgment. Thus, the court finds that the state court's application of Federal law was not unreasonable on this point. Therefore, petitioner Gully's objections to this portion of Judge Zoss's report and recommendation are also denied.

vi. Claim A(6)

Petitioner Gully further contends that his trial counsel was ineffective because he did not object to opinion testimony of Larncey Foy and Officer Brand. Foy was asked, "When Rick Foy is up here and gets shot, if he would have had a gun what would you have expected him to do?" Tr. at p. 69. Foy answered, "Fire Back." Tr. at p. 69. Officer Brand was asked to explain how Ricky Foy could have been shot in the shoulder. Tr. at p. 32. Judge Zoss found Gully's argument on this point to be without merit. The court agrees. Even if the court assumes, *arguendo*, that the questions posed to Foy and Brand required the witnesses to provide opinion testimony, Gully has not demonstrated that his "counsel's deficient conduct more likely than not altered the outcome of the case." *Strickland*, 466

U.S. at 696. Brand's testimony that Ricky Foy was shot in the side of the shoulder was consistent with and fully supported by the uncontradicted medical evidence offered at trial. Foy's testimony was also non-consequential. Therefore, petitioner Gully's objections to this portion of Judge Zoss's report and recommendation are also denied.

vii. Claim A(8)

Petitioner Gully further contends that his trial counsel was ineffective because he did not object to hearsay testimony of Larncey Foy and Dr. Dan Warlick. Both men testified that Ricky Foy told them he had been shot. Judge Zoss concluded that because this testimony was cumulative, no prejudice resulted. The court agrees. The uncontradicted testimony at trial was that Ricky Foy was shot by Gully. Moreover, the court concludes that Ricky Foy's statement to Larncey Foy would be admissible under the excited utterance exception to the hearsay rule. *See* IOWA R. EVID. 803(2). The Iowa Supreme Court has defined the "excited utterance" exception to mean: "A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." *See State v. Ogilvie*, 310 N.W.2d 192, 196 (Iowa 1981). A statement made moments after being shot, while in flight from the shooter, would constitute such a statement. *See United States v. Phelps*, 168 F.3d 1048, 1054 (8th Cir. 1999) (holding that testimony of 911 dispatcher was admissible under the excited utterance exception where dispatcher testified that victim called 911 reporting that someone had been shooting at her). Therefore, petitioner Gully's objections to this portion of Judge Zoss's report and recommendation are also denied.

viii. Claim A(9)

Petitioner Gully next contends that his trial counsel was ineffective because he did not seek a jury instruction regarding the defense of third persons. Judge Zoss found that this claim was without merit because there was no evidence to justify such an instruction. The court agrees and concludes that Gully's trial counsel's performance was not deficient in not

seeking a jury instruction on which there was no factual predicate. The court further concludes that Gully was not prejudiced by this claimed deficiency in his counsel's performance. Therefore, petitioner Gully's objections to this portion of Judge Zoss's report and recommendation are also denied.

ix. Claim A(10)

Petitioner Gully also contends that his trial counsel was ineffective in advising Gully to proceed to trial rather than accept a plea bargain to reduced charges. In the case of an ineffective assistance claim based on rejection of a plea bargain, the Eighth Circuit Court of Appeals has recognized that "after rejecting the proposed plea bargain and receiving a fair trial, [the claimant] may still show prejudice if the plea bargain agreement would have resulted in a lesser sentence." *Engelen v. United States*, 68 F.3d 238, 241 (8th Cir. 1995) (citing cases so holding). However, the claimant must also show that "but for counsel's advice, he would have accepted the plea." *Id*. In order to command an evidentiary hearing--and thus this court concludes to establish the claim--"the movant must present some credible, non-conclusory evidence that he would have pled guilty had he been properly advised." *Id.*

The state post-conviction court found that Gully chose not to accept the plea offer against the advice of his counsel. Prior to evidence being presented at Gully's trial, the following colloquy occurred in state court:

> THE COURT: This record is in the presence of the Defendant and counsel of record, as well as Mr. Mark Crimmins, who is counsel for the Defendant in a separate pending criminal matter. This record comes prior to the formal commencement of the trial. The jury, of course, has been selected, it's sworn but we have not yet formally commenced the trial. But the court wanted to have placed on the record the [s]tate of the plea negotiations that have occurred up to this point to make sure there is a clear understanding of the decisions and choices made prior to the commencement of this trial.

Mr. Hansen, I do understand that you have made some plea overtures and I have asked Mr. Crimmins to be a part of these proceedings since I believe the plea negotiations have included the charge or charges that he represents Mr.Gully on. There are three charges in this case. T[w]o are presently or will be tried. There is two charges of Attempted Murder and one charge of Possession of a Firearm as a Felon. And Mr. Crimmins then represents Mr. Gully in the other case where the charge is Attempted Murder and Possession of a Firearm as a Felon. Is that correct?

MR. HANSEN: That's correct. The case number on that case where Mr. Crimmins represents the Defendant is 4234-0593. And Mr. Crimmins also represents the Defendant on a charge of Assault With a Dangerous Weapon, which is an aggravated misdemeanor, in case No. 4412-0893.

MR. CRIMMINS: Your Honor, I believe there is a third count on the Trial Information as well; isn't there?

MR. HANSEN: On yours. That's right. In case 4234-0593 the Defendant is charged with attempting to commit murder upon Kenneth Thornton. Count II is Possession of a Firearm as a Felon. Count III is did [sic] assault Otis or Edker Foy and displayed a dangerous weapon in the assault.

THE COURT: Mr. Hansen, could you then place on the record the plea that you have offered the Defendant?

MR. HANSEN: What I have offered the Defendant is the opportunity to plead guilty to two class "C" felonies, each carrying a maximum term of 10 years in prison, with no sentencing concessions. It would be the State's intention to seek consecutive sentences on those. And then–

THE COURT: That would mean all other charges would be dismissed?

MR. HANSEN: That's correct. That would be a

resolution of all of the charges pending against the Defendant.

THE COURT: And these two class "C" felonies, it would be two 10-year sentences.

MR. HANSEN: Correct.

THE COURT: And the maximum sentences for the charges that now pend [sic] against the Defendant would be 87 years.

MR. FORS: More than that your Honor. I was not aware of some of the charges.

THE COURT: Or 89 years now.

MR. HANSEN: I believe 89 years would be correct.

THE COURT: You have informed both Mr. Fors and Mr. Crimmins of the plea bargain that you have offered?

Mr. HANSEN: I advised Mr. Fors when we were here two days ago in chambers, and Mr. Crimmins and I have had discussions about that as well.

THE COURT: The Court would give defense counsel an opportunity to put on the record anything that they wish at this time. Mr. Crimmins or Mr. Fors? If you want to tell me what your recommendations have been or if you want to put anything on the record, I'll give you this opportunity.

MR. FORS: Well, your Honor, just for the record, I would indicate that I have had an opportunity to speak with Mr. Gully about the charges, the potential consequences of either accepting or not accepting the plea, and he has elected not to accept the plea.

THE COURT: Do you wish to inform the Court as to your recommendations?

MR. FORS: No, your Honor.

THE COURT: Mr. Crimmins?

MR. CRIMMINS: Your Honor, I did the same. I spent a considerable amount time with Mr. Gully last night in discussing this. I advised Mr. Gully I felt he had some exposure on some of these charges and that this is certainly a plea bargain that he should consider. And it's my understanding from talking to Benny last night that he will not take the two ten years. In leaving with him we discussed the possibility of a 10 year maximum. He was going to think about that last night. And in doing that, I contacted the county attorney with a request to do possibly a Rule 9 to the two class "C" felonies. However, the county attorney said that was not a possibility. At that point in time I felt plea negotiations had probably broken off. That's where we are at this morning.

THE COURT: Well, does the defense have anything to respond other than no?

MR. FORS: Your Honor, Mr. Gully indicated this morning that he would be willing to accept a five and a two year sentence.

THE COURT: Mr. Fors, do you wish to place anything else into this record that would be appropriate either now or in the future?

MR. FORS: Only if Mr. Gully might have some comments himself.

THE DEFENDANT: I feel like this. I realize what happened and I take part of the blame for my action. But as I have always told me attorney here, I wasn't the one that initiated this trouble and I did everything within myself to avoid it. But they were very persistent and wouldn't leave well enough alone. I feel to a certain extent that I should be punished for what I did, but I just don't feel like the offer he

> offered me, like two 10 years in prison, shit, that's like doing 25 years. Since I am fighting this matter in self defense, I don't see how I am getting any justice done. I mean after all, I was shot at. I have been arrested for months, beat up and stuff, and I just can't comprehend, you know, the offer he is trying to give me.
>
> I disagree with the 10-year sentence because I figure if I get 10 years, I am still going to end up doing about five, and I just can't accept that.
>
> I realize the charges you guys have got against me and all, but they are just charges. I ain't guilty of nothing. I am just being charged. I feel just like, you know, I could do the two years and a five-year sentence. I think that would be more fair. And they aren't too enthusiastic about it but, like I said, I expect to go down, you know. I don't think I should be in prison, you know, for no five years for something that I tried to prevent. The offer he then made to me just ain't fair to me.
>
> THE COURT: Well, thank you for your comments. The only reason why the Court is insisting on this record is to insure that there is some understanding of the consequences. I was concerned that the plea bargain that had been discussed involved another lawyer and that had not previously been part of this case and I want to insure that there is a clear understanding of the consequences that can occur and that the choice that is made to refuse the plea bargain is indeed your choice and what you want to do. That's what you are assuring me.
>
> THE DEFENDANT: Um-hum.
>
> THE COURT: You have talked thoroughly to both your counsel, Mr. Gully.
>
> THE DEFENDANT: Sure did.

Tr. at pp. 2-6.

The court concludes that Gully understood the consequences of rejecting the plea bargain offered and proceeding to trial on the pending charges. Moreover, while Gully

asserts that he rejected the plea on the advice of counsel Fors, the record clearly shows that his other counsel, Crimmins, informed Gully that "he had some exposure on some of these charges and that this is certainly a plea bargain that he should consider." Tr. at p.4. Fors merely advised Gully that the state's case wasn't the strongest that he had ever seen and that he had a legitimate self-defense claim. Post-Conviction Tr. at p. 48. Gully's trial counsel's advice was well within the bounds of reasonable professional judgment. Thus, the court finds that the state court's application of Federal law was not unreasonable on this point. Therefore, petitioner Gully's objections to this portion of Judge Zoss's report and recommendation are also denied.

b. Alternate juror claim-claim A(7)

Gully also asserts that an alternate juror was permitted to participate in a portion of the jury's deliberations. Judge Zoss found that Gully had not demonstrated that an alternate juror participated in the deliberations after the jury was charged and that, even if true, that he had not been prejudiced by the alternate juror's participation in the jury's deliberations. The court concurs. This claim is based entirely on Gully's memory of an alleged third-party hearsay statement, which Gully was not able to substantiate. Petitioner Gully's objections to this portion of Judge Zoss's report and recommendation are also denied.

c. Appellate counsel-claims B(2)-(3)

Petitioner Gully further claims his appellate counsel was ineffective for failing to raise on appeal the issues of ineffective assistance of trial counsel and insufficient evidence to sustain the charges. Judge Zoss concluded that Gully had failed to meet either prong of the *Strickland* test. No objections have been filed regarding this portion of the report and recommendation, and it appears to the court upon review of Judge Zoss's findings and conclusions, that there is no ground to reject or modify them. Therefore, the court accepts this portion of Judge Zoss's Report and Recommendation

d. Ineffective assistance of PCR counsel

Petitioner Gully also asserts claims that his state post-conviction relief counsel was ineffective. Judge Zoss found that this was not a cognizable claim for relief. No objections have been filed regarding this portion of the report and recommendation, and it appears to the court upon review of Judge Zoss's findings and conclusions, that there is no ground to reject or modify them. Therefore, the court accepts this portion of Judge Zoss's Report and Recommendation

C. Certificate of Appealability

Under 28 U.S.C. § 2253(c)(1), a § 2255 petitioner may not appeal a final order to the Court of Appeals unless "a circuit justice or judge issues a certificate of appealability." A court may not issue such a certificate unless the petitioner can demonstrate a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *United States v. Apker*, 174 F.3d 934, 937 (8th Cir. 1998). In describing the standard for issuing a certificate of appealability, the Second Circuit Court of Appeals has explained that " 'the petitioner need not show that he should prevail on the merits. Rather, he must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further."' *Nelson v. Walker*, 121 F.3d 828, 832 (2d Cir. 1997) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)). With respect to Gully's claims, the court shall not grant a certificate of appealability pursuant to 28 U.S.C. § 2253(c)(3).

III. CONCLUSION

For the reasons delineated above, the court **overrules** petitioner Gully's objections to Judge Zoss's Report and Recommendation. Therefore, pursuant to Judge Zoss's recommendation, the petition is **dismissed**. Moreover, the court determines that the petition

does not present questions of substance for appellate review. *See* 28 U.S.C. § 2253(c)(2); FED. R. APP. P. 22(b). Accordingly, a certificate of appealability will not issue as to any claim for relief.

IT IS SO ORDERED.

DATED this 19th day of March, 2001.

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MARK W. BENNETT
CHIEF JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA